



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 5, 2003

Ms. Sara Schulz Koehn
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7400 Gaylord Parkway, Suite 200
Frisco, Texas 75034

OR2003-7971

Dear Ms. Koehn:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190531.

The Sweetwater Independent School District (the "district"), which you represent, received a request for complaint, personnel, and investigative information regarding a named district employee. You claim that the submitted information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.107, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we understand you to assert that the submitted information is excepted in its entirety pursuant to section 552.102(a) of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). You indicate that all of the submitted information is contained within the personnel file of the employee at issue. In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Industrial Found.*, 540 S.W.2d at 683-85. Accordingly, we begin by considering your claim under section 552.102(a) in the context of the doctrine of common-law privacy as encompassed by section 552.101 of the Government Code.¹

¹Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found.*, 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Upon review of the submitted documents, we have marked a small amount of information pertaining to the employee at issue that is protected by common-law privacy and must be withheld. We find, however, that the remainder of the personnel information of the named employee is not highly intimate or embarrassing for the purpose of common-law privacy, or is of legitimate interest to the public. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of public employee's resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs the employee's job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under statutory predecessor to section 552.101 or section 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, we determine that the remaining submitted information is not excepted from disclosure pursuant to section 552.102(a) of the Government Code.

We note, however, that the submitted personnel records contain transcripts, portions of which are excepted from disclosure under section 552.102(b) of the Government Code. Section 552.102(b) excepts most information on a transcript from an institution of higher education maintained in the personnel files of professional public school employees. *See* Gov't Code §552.102(b). Section 552.102(b) excepts from disclosure all information from transcripts other than the employee's name, the courses taken, and the degree obtained. Open Records Decision No. 526 (1989). Thus, with the exception of the employee's name, the courses taken, and the degree obtained, the district must withhold the information in the submitted transcripts pursuant to section 552.102(b).

You also claim that portions of the submitted information are excepted under section 552.101 of the Government Code as information made confidential by law. You contend that portions of the submitted information are confidential pursuant to section 261.201 of the Family Code, which provides in pertinent part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You indicate that the employee at issue was placed on administrative leave pursuant to an investigation of alleged child abuse. We note, however, that a school district is not an agency authorized to conduct an investigation under chapter 261. *See* Fam. Code §§ 261.301, .406. Although you state that law enforcement agencies are involved in the investigation, we find that none of the submitted information was created by an agency authorized to conduct a chapter 261 investigation. Furthermore, you have not informed us that the submitted information was sent to an entity that is conducting an investigation under chapter 261. We therefore determine that, to the extent the submitted information has been forwarded to an agency conducting an investigation under chapter 261, it constitutes “working papers used or developed” in an investigation under that chapter and is therefore confidential and must be withheld under section 552.101. However, if the submitted information was not forwarded to an entity conducting such an investigation, it is not confidential under chapter 261 and may not be withheld by the district on that basis.

Next, you indicate that the submitted documents contain information that is confidential under the Family Educational Rights and Privacy Act of 1974 (“FERPA”), section 1232g of title 20 of the United States Code.² FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases

²You raise section 552.114 of the Government Code, which excepts from disclosure “information in a student record at an educational institution funded wholly or partly by state revenue.” This office generally has treated “student record” information under section 552.114(a) as the equivalent of “education record” information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A).

In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. *See* Open Records Decision No. 634 at 6-8 (1995). In this instance, you have submitted information that you contend is confidential under FERPA. Accordingly, we will address your claim.

Information must be withheld from required public disclosure under FERPA only to the extent reasonable and necessary to avoid personally identifying a particular student or that student's parent. *See* Open Records Decision Nos. 332 (1982), 206 (1978). Upon review, we agree that the submitted documents include education records that identify particular district students. We have marked student identifying information in the submitted documents that the district must withhold pursuant to FERPA.

With respect to the remaining information, we note that the submitted documents include the employee's Employment Eligibility Verification, Form I-9. The public availability of the I-9 form is governed by title 8, section 1324a of the United States Code, which provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also*

8 C.F.R. § 274a.2(b)(4). Release of the I-9 form in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we determine that the I-9 form is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You also contend that evaluations of the employee are confidential under section 21.355 of the Education Code. Section 21.355 provides, “A document evaluating the performance of a teacher or administrator is confidential.” This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also determined that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of the evaluation. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is serving as an administrator at the time of the evaluation. *Id.* Thus, we make the following determination: if the employee at issue was teaching at the time the submitted evaluations were created, and was required to hold and did hold a certificate or permit under chapter 21 of the Education Code, the documents we have marked are confidential under section 21.355 of the Education Code and must be withheld pursuant to section 552.101 of the Government Code.

We note that portions of the submitted information may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential pursuant to section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117 on behalf of current or former officials or employees who elected to keep information confidential pursuant to section 552.024 prior to the date on which the request for this information was made.

The submitted personnel records contain the named employee’s home address and telephone number, social security number, and information revealing whether the named employee has family members. Thus, if the employee timely elected to keep this information confidential, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. If the employee did not timely elect to keep the information confidential, however, the district may not withhold this information under section 552.117(a)(1) of the Government Code.

In the event the employee’s social security number is not excepted from disclosure under section 552.117(a)(1), however, we note that the social security number may be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security

Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the employee's social security number is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

Finally, you have marked a portion of the submitted information that you contend is protected under the attorney-client privilege. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally

excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). You have marked a portion of the information that consists of a communication from the district's counsel to the superintendent. We understand you to represent that the communication was made in furtherance of the rendition of professional legal services to the district, and that the confidentiality of the communication has been maintained. Based on your comments and our review, we agree that the marked information is protected by the attorney-client privilege and may be withheld under section 552.107 of the Government Code.

In summary, to the extent the submitted information has been forwarded to an agency conducting an investigation under chapter 261 of the Family Code, the district must withhold the information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. However, if the submitted information was not forwarded to an entity conducting such an investigation, it is not confidential under chapter 261 and may not be withheld on that basis. In such a case, we make the following determination: with the exception of the employee's name, courses taken, and degree obtained, the district must withhold the marked transcripts pursuant to section 552.102(b) of the Government Code. We have marked student identifying information that the district must withhold pursuant to FERPA. The submitted I-9 form must be withheld pursuant to section 552.101 of the Government Code in conjunction with federal law. With respect to the submitted evaluation documents, the district must withhold the documents under section 552.101 in conjunction with section 21.355 of the Education Code, provided the employee at issue was teaching at the time the information was created and was required to hold and did hold a certificate or permit under chapter 20 of the Education Code. Otherwise, the district must release this information to the requestor. We have marked information that must be withheld under section 552.117(a)(1) of the Government Code, provided the employee timely elected to keep the information confidential. The employee's social security number may be confidential under section 552.101 in conjunction with federal law. We have marked information that is protected by the attorney-client privilege and may be withheld pursuant to section 552.107 of the Government Code. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/sdk

Ref: ID# 190531

Enc: Submitted documents

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